82D CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 2389

GEORGE B. HENLY CONSTRUCTION CO.

JULY 1, 1952.—Committed to the Committee of the Whole House and ordered to be printed

Mr. JONAS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1707]

The Committee on the Judiciary, to whom was referred the bill (S. 1707) for the relief of George B. Henly Construction Co., having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of the proposed legislation is to pay the sum of $22,929.69 to the George B. Henly Construction Co. in full settlement of all claims against the United States for additional compensation for extra work performed by the company under a contract dated February 16, 1948, between the United States and the company for the construction of certain earthwork and structures.

STATEMENT

On January 14, 1948, the George B. Henly Construction Co. submitted a bid for the construction of a wasteway for the Bureau of Reclamation. The bid was accepted and the construction contract was signed February 16, 1948. Prior to the submission of the bid, Mr. George B. Henly and engineers from the Bureau of Reclamation physically inspected the property and found no evidence of water in the natural drainage channel where the wasteway was to be constructed. This inspection for the wasteway was made during the winter months when the surrounding area was not being irrigated.

During the course of the construction of the wasteway, and about April 1948, farmers whose lands were adjacent to the land on which the wasteway was being constructed began to irrigate their lands, and a large amount of the surface and subsurface drainage water began to flow into the area of the wasteway. The contractor and the Reclamation engineers conferred regarding these conditions and decided that a

permanent installation of approximately 33 metal corrugated pipes should be made at 33 different locations to convey this drainage and seepage water through the wasteway banks and into the wasteway channel. This necessitated work not contemplated either by the contractor or the Bureau of Reclamation at the time when the contract was entered into. The construction company contends that during these discussions oral representations were given to the company that it would be compensated for the extra work which it was obliged to perform as a result of the installation of these pipes.

The job was completed on November 30, 1948, and the final estimate presented in December 1948. At this time disagreement arose as to the right of the construction company to receive extra compensation under the terms of the contract for the extra work which the company had undertaken. This disagreement was not resolved, and on January 26, 1949, the contractor signed a release on the contract with an exception for the expense involved in doing the extra work to complete the contract and a 10-percent profit on the over-all contract.

The dispute over the additional compensation was submitted to the contracting officer, as provided in the contract, and the contracting officer ruled that the extra work which the contractor did was not as a result of a "changed condition" as that term was used in article 4 of the contract, notwithstanding the fact that it is evident that the conditions encountered were not anticipated either by the contractor or by the Bureau of Reclamation. If the contracting officer had decided that the extra work occurred as a result of "changed conditions," as defined in the contract, the contractor would have been paid for the additional cost.

Under the contract, the construction company was permitted 30 days to appeal from the decision of the contracting offier to the head of the department concerned. The contractor in this case did not appeal from the decision of the contracting officer until nearly 10 months following the decision of the contracting officer.

The committee received reports on this legislation from the Department of Justice and the Department of the Interior. The Department of the Interior recommends against enactment of the legislation, asserting that the encountering of water in this case was within the hazards assumed by the contractor under the contract. The Department of Justice recommends against enactment of the bill, for the reason that the claimant failed to pursue his administrative remedy diligently as required by the contract.

A subcommittee of the Judiciary Committee held hearings on this bill. From the evidence submitted at the hearing, and from the reports submitted by the two Departments, the committee is satisfied that (1) extra work was performed by the contractor in order to complete the contract; and (2) the Government has accepted the work done by the contractor and has expressed no dissatisfaction with the work done. It is also clear that the extra work which was eventually required was not within the contemplation of either of the parties at the time that the contract was entered into. In view of these circumstances, it is difficult for the committee to see why the contractor should bear the total expense of the extra work involved in the successful completion of this contract. The committee therefore has no difficulty in recommending that the construction company be reimbursed for the extra work performed to complete the contract.

Attached to this report is the report referred to earlier of the Department of the Interior submitted in connection with this bill. Except for the conclusion, which has already been discussed, the Department of Justice report substantially repeats the information contained in the report of the Department of the Interior, and is, therefore, not appended to this report. Two articles of the contract which are pertinent to the discussion of this bill are also appended for reference.

DEPARTMENT OF THE INTERIOR,
Washington 25, D. C., December 4, 1950.

Hon. PEYTON FORD,
Deputy Attorney General, Department of Justice,
Washington 25, D. C.

MY DEAR MR. FORD: S. 4184, a bill for the relief of the George B. Henly Construction Co., on which you requested, under date of September 28, a report from this Department, would provide for the settlement of claims of the George B. Henly Construction Co. under Government contract No. I2r–17891 for construction of the Locket Gulch wasteway, Owyhee project, Oregon-Idaho.

According to records of this Department, the total amount of $43,286.05 as set forth in the relief bill consists of an item of $22,929.69 representing losses alleged to have been incurred as a result of encountering substantial amounts of surface and underground water during performance of work on the wasteway, and an item of $20,356.36 for profit.

The wasteway was constructed in the bottom of a natural drainage channel, and the water encountered was seepage and waste water from adjacent irrigated areas which had been under irrigation for 12 years prior to the letting of the contract. The surveys for the wasteway were made during the winter months when the surrounding area was not being irrigated. At that time there was, of course, no evidence of water in the channel, and Government personnel making the survey were not aware of the fact that a live stream flowed in the channel during the irrigation season. The specifications, therefore, did not make specific mention of the probability that water would be encountered, although the standard language of such specifications makes the contractor responsible for constructing the work and caring for any water encountered. The contractor has informed the Bureau of Reclamation that he went over the ground prior to bidding, and that there was no evidence to show that large quantities of water would be encountered.

During the construction of the wasteway in the summer following the prebidding examination, the work was continually hampered by water from the adjoining lands and by a live stream flowing in the channel. It became necessary for the Government to order the installation of 33 drainage inlets to conduct the waste water through the banks of the wasteway and into the channel. The contractor alleges that this requirement proves the existence of a "changed condition" for which an adjustment of the contract consideration should be made. The contracting officer decided that although the conditions encountered were not anticipated, they were not of such an unusual character as to constitute "changed conditions" within the meaning of the contract, and denied the claim, except for an allowance of $837.50 for extra work performed by the contractor in stabilizing foundations for the structures. This decision was based upon the fact that it is not unusual in irrigated areas such as was here involved to find that natural channels which are dry in the nonirrigation season become live streams during the irrigation season as a result of seepage and waste water from irrigation of adjacent lands.

The contractor failed to exercise his right of appeal from the decision of the contracting officer within 30 days as provided in the contract. The appeal, which was made approximately 10 months after the receipt of the findings by the contractor, was denied by this Department because it was not timely.

No audit of the contractor's records has been made to determine if the actual losses were $22,929.69 as alleged. With reference to the contractor's claim of $20,356.36 as profit, it has not been alleged that the job would have yielded such a profit, or any profit at all, even if the water had not been encountered.

The contractor's bid of $155,647 was $32,665 lower than the next low bid, and it is the belief of the contracting officer that the contractor had no substantial contingency in his bid for extra expense due to the possibility of encountering

water. The work was prosecuted by the contractor in an economical and diligent manner, and his costs were undoubtedly increased by a substantial amount due to encountering water. However, since the encountering of water is within the hazards assumed by contractor under the contract, it is not believed that congressional relief should be granted. It is therefore, the recommendation of this Department that the legislation be not enacted.

If, however, the committee should decide to report favorably on the proposed legislation, then it is recommended that the bill be amended to provide only for payment to the contractor in the amount of the actual losses sustained by him as determined by this Department.

Sincerely yours,

VERNON D. NORTHRUP,
Assistant Secretary of the Interior.

EXTRACT FROM CONTRACT

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially *differing from those shown on the drawings or indicated in the specifications*, or unknown conditions of an unusual nature differing materially from those encountered and generally recognized as inhering in work of the *character provided for in the plans and specifications*, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions. [Italics added.]

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. *In the meantime the contractor shall diligently proceed with the work as directed.*

○